Supreme Court, U.S.
FILED
JAN 19 1979
MICHAEL RODAK, JR., CLERK

[J-4]

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-965

JAMES A. FARRELL and LOUIS T. DiLORENZO,

Petitioners,

— against —

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
Telephone (518) 474-7138

JEREMIAH JOCHNOWITZ
WILLIAM J. KOGAN
Assistant Solicitors General
of Counsel

TABLE OF CONTENTS

Page

Statement 1

Questions Presented 2

Facts 2

ARGUMENT:

POINT I — Petitioners have failed to demonstrate that they have exhausted all available and adequate administrative remedies 4

POINT II — The Petition should be denied because petitioners waived the due process which was available to them under the collective bargaining agreement and they should otherwise be held to the terms of that agreement 6

CONCLUSION — Petitioners' application for certiorari should be denied 8

Table of Cases:

Antinore v *State of New York*, 40 NY2d 921, affg 49 AD 2d 6 6

Arnett v *Kennedy*, 416 US 134, 40 L ed 2d 15 (1974) ... 8

Bignall v *North Idaho College*, 538 F2d 243 (9th Cir., 1976) 7

Buffalo Forge Co. v *Steelworkers*, 428 US 397, 49 L 2d 1022 (1976) 5

Cafeteria Workers v *McElroy*, 367 US 886, 6 L ed 2d 1230 (1961) 7

Chung v *Park*, 514 F2d 382 (3d Cir., 1975) cert. den. 423 US 948 ..... 5, 6, 7

Eisen v *Eastman*, 421 F2d 560, 567 6

Page

Johnson v *Board of Regents of University of Wisconsin*, 377 F Supp 227 (WD Wis., 1974), affd 510 F2d 975 (7th Cir., 1975) 7

Klein v *Board of Higher Education*, 434 F Supp 1113 (SDNY, 1977) 7

Lake Michigan College Federation of Teachers v *Lake Michigan Community College*, 518 F2d 1091 cert. den. 427 US 904 6

Mathews v *Eldridge*, 424 US 319, 47 L ed 2d 18 (1976) .. 7

McGautha v *California*, 402 US 183, 28 L ed 2d 711 (1971) 8

McGee v *United States*, 402 US 479, 484, 29 L ed 2d 47, 53 (1971) 5

Middendorf v *Henry*, 425 US 25, 47 L ed 2d 556 8

Mills v *Long Island R.R. Co.*, 515 F2d 181, 183 (2d Cir., 1975) 5, 6

Morrissey v *Brewer*, 408 US 471, 33 L ed 2d 484 (1972) .. 7

Nolde Bros. Inc. v *Bakery Workers*, 430 US 243, 254, 51 L ed 2d 300 (1977) 5

Rieder v *State University of New York*, 39 NY2d 845 5

Turnstall v *Brotherhood of Locomotive, Firemen & Engineermen*, 323 US 210, 213, 65 S Ct 235 (1944) 5

United Steelworkers v *Warrior & Gulf Navigating Co.*, 363 US 574 (1960) 5

Wagle v *Murray*, 546 F2d 1329, 1332 6

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-965

JAMES A. FARRELL and LOUIS T. DiLORENZO,

Petitioners,

— against —

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

Statement

The respondents submit this brief in opposition to the petitioners' application for certiorari to review the order of the Court of Appeals of the State of New York which dismissed the appeals taken by the petitioners from an order of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. The Appellate Division, where the separately instituted DiLorenzo action and Farrell proceeding had been consolidated due to the unity of the issue involved, *i.e.*, the legality of the termination of positions with the State University due to budgetary restraints, unanimously modified the judgment of the Supreme Court of the State of New York

and dismissed the complaint in the action brought by the petitioner DiLorenzo and unanimously affirmed the judgment of the Supreme Court and dismissed the proceeding brought by the petitioner Farrell.

Questions Presented

1. Should certiorari be denied because of the failure of the petitioners to establish that they have exhausted all available and adequate administrative remedies?

2. Should not the petitioners be legally bound to the procedures provided in the collective bargaining agreement negotiated in their behalf by their union?

3. Should not the petitioners be legally bound to the waiver of judicial due process contained in the collective bargaining agreement negotiated in their behalf?

Respondents contend that the questions should be answered in the affirmative.

Facts

The only facts available to the New York State courts were presented in the petition, the complaint, and in respondents' affidavits and exhibits since the respondents, in lieu of serving answers to the petition and complaint, moved to dismiss in each instance on the grounds of failure to state a cause of action and failure to exhaust administrative remedies. The records in each of these matters (Monroe County Clerk's Index Nos. 2510/76 and 2476/76) establish that the DiLorenzo action and the Farrell proceeding were commenced on or about February 29, 1976. Annexed to the respondents' motion papers in the New York State Supreme Court are exhibits which establish that DiLorenzo instituted a grievance proceeding pursuant to the collective bargaining agreement between his union and his employer on March 10 and Farrell acted likewise on March 11. The case had been argued before Supreme Court Justice

BLAUVELT on March 9, 1976. The record is barren of proof as to whether the grievance and arbitration procedures were pursued, much less concluded.

The underlying facts are substantially as alleged herein by petitioners. They were both tenured professors at the State University at Brockport when in January, 1976 they were advised that their appointments would be terminated as part of a retrenchment made necessary by a reduction in the State University operating budget. At the time of the retrenchment a collective bargaining agreement was in effect between the petitioners' union representative, the United University Professions, Inc. (UUP) and the State University. The agreement, as set forth in the Appellate Division decision appended to the petition in this Court, contained an Article 35 which dealt extensively with retrenchment and the procedures associated therewith. In addition the agreement set forth in Article 7 thereof, a grievance and arbitration procedure for the resolution of disputes resulting from the interpretation and application of provisions of the agreement. Judge BLAUVELT specifically held in each case that "any grievance resulting from retrenchment is arbitrable" (Petitioners' Appendix, pp. 21a and 25a).

As previously noted, the petitioners initially chose to ignore the administrative remedies provided by the agreement and commenced separate suits for reinstatement.

The New York State Supreme Court in parallel rulings in each case found that the petitioners herein had waived their rights to the totality of due process available in the courts of New York State as a result of the provisions of Article 7 of the agreement and that their sole and exclusive remedy was the administrative remedies of Article 7 of the agreement.

The opinion of the Appellate Division of the Supreme Court of the State of New York (62 AD2d 583) reviewed the facts and the agreement provisions and stated:

> "Appellants have agreed to be bound by the collective bargaining agreement by their membership in the negotiating unit, irrespective of whether they personally supported the contract when approved. Whatever other rights they might have had of a procedural or constitutional nature, are deemed waived (Antinore v. State of New York, 49 A D 2d 6 affd 40 NY 2d 921). The Appellants fail to take into account that they have agreed to grant the State University of New York the right to terminate their services without a hearing upon a claimed retrenchment other than that provided by the agreement's grievance procedures and binding arbitration."

The Appellate Division affirmed the judgments of the Supreme Court dismissing the petition and the complaint.

The petitioners' appeal as of right to the New York State Court of Appeals was dismissed on motion of the respondents on the ground that "no substantial constitutional question is directly involved (CPLR 5601[b][1]."

The appellants could have but did not move for permission to appeal to the Court of Appeals (CPLR 5602).

The petition for a writ of certiorari was received by respondents' attorney on December 20, 1978.

ARGUMENT

POINT I

PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE EXHAUSTED ALL AVAILABLE AND ADEQUATE ADMINISTRATIVE REMEDIES.

Both the New York State Supreme Court and the Appellate Division of the Supreme Court held in their decisions herein that the collective bargaining agreement between the UUP and the State University made available to the petitioners administrative procedures by which they could challenge the retrenchment. Indeed Joan de R. O'Byrne, attorney for DiLorenzo stated in an affidavit appearing at page A-30 of the record in the Appellate Division:

> "3. That there is no question that plaintiff has a grievance remedy under the collective bargaining agreement to prosecute alleged violations of such agreement * * *."

The paragraph goes on to argue that constitutional issues cannot be resolved by an arbitrator but that argument begs the question. A similar disclaimer of availability of an administrative remedy is found in the Farrell petition and as a bare conclusion of law is, it is submitted, equally ineffective. The issue is whether the grievance procedure could have aired the factual issues concerning the basis for petitioners' termination and that was never reached because petitioners both failed to exhaust those remedies.

New York State law requires that administrative remedies be exhausted before resort to the Courts is had (CPLR § 7801 (1); *Rieder* v *State University of New York*, 39 NY2d 845). Had the petitioners exhausted the arbitration process resort to New York State Courts to confirm, vacate or modify an arbitration award is available under CPLR Article 75.

This Court has held that there is a "strong presumption favoring arbitrability" (*Nolde Bros. Inc.* v *Bakery Workers*, 430 US 243, 254, 51 L ed 2d 300 [1977]) and that public policy favors the exclusion of the Courts from matters which are subject to arbitration (*Buffalo Forge Co.* v *Steelworkers*, 428 US 397, 49 L ed 2d 1022 [1976]; *United Steelworkers* v *Warrior & Gulf Navigating Co.*, 363 US 574 [1960]). It has also been held that arbitration can satisfy the requirements of due process (*Chung* v *Park*, 514 F2d 382 [3d Cir., 1975] cert. den. 423 US 948). The administrative remedies available to the petitioners herein have not been attacked nor have they been shown to have been exhausted - they should be deemed to have been available and adequate and the petitioners' failure to exhaust should, it is submitted, preclude the requested review (*cf. McGee* v *United States*, 402 US 479, 484, 29 L ed 2d 47, 53 [1971]; *Turnstall* v *Brotherhood of Locomotive Firemen & Engineermen*, 323 US 210, 213, 65 S Ct 235 [1944]; *Mills*

v *Long Island R.R. Co.*, 515 F2d 181, 183 [2d Cir., 1975]; *Wagle* v *Murray*, 546 F2d 1329, 1332; *Eisen* v *Eastman*, 421 F2d 560, 567).

POINT II

THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS WAIVED THE DUE PROCESS WHICH WAS AVAILABLE TO THEM UNDER THE COLLECTIVE BARGAINING AGREEMENT AND THEY SHOULD OTHERWISE BE HELD TO THE TERMS OF THAT AGREEMENT.

The petitioners argue at length that the so-called doctrine enunciated in *Antinore* v *State of New York*, 40 NY2d 921, affg 49 AD2d 6 is central to this application and that novel questions are presented herein. Respondents submit that not only does the instant petition not present the *Antinore* "doctrine" for review but that the substantive issue which petitioners purport to raise is well settled by prior decisions of this Court.

As discussed in Point I (*supra*) the petitioners were afforded due process under the collective bargaining agreement, which due process they chose to waive by their failure to pursue that remedy. They should not now be heard to claim that such rights were denied to them. Further, as acknowledged in the petition (at p. 11), *Antinore* held that the minimum requirements of due process had been satisfied by the procedures established in the collective bargaining agreement. Similar conclusions have been reached in *Mills* v *Long Island Railroad Co.*, 515 F2d 181 (2d Cir., 1975) and *Chung* v *Park*, 514 F2d 382 (3d Cir., 1975), cert. den., 423 US 948 (1975) and compare *Lake Michigan College Federation of Teachers* v *Lake Michigan Community College*, 518 F2d 1091 cert. den. 427 US 904.

Fundamental to the issue presented herein are the many decisions of this Court holding that due process is a flexible

concept the dimensions of which may vary according to the circumstances (*Mathews* v *Eldridge*, 424 US 319, 47 L ed 2d 18 [1976]; *Morrissey* v *Brewer*, 408 US 471, 33 L ed 2d 484 [1972]; *Cafeteria Workers* v *McElroy*, 367 US 886, 6 L ed 2d 1230 [1961]). The provisions of the collective bargaining agreement providing for grievance procedures and arbitration (see *Chung* v *Park*, *supra*), together with New York Civil Practice Law and Rules Article 75 providing for review of an arbitration award, grant to the petitioners the process which is due when the State finds it necessary to terminate positions as the result of financial exigencies. Such circumstances, it is submitted, are different from, and to be contrasted with circumstances where termination of a tenured employee results from a disciplinary proceeding or termination during a probationary period where tenure has not been acquired but a stigma attaches to such action.

In *Klein* v *Board of Higher Education*, 434 F Supp 1113 (SDNY, 1977) the plaintiffs were formerly tenured members of the faculty of the City University of New York whose employment had been terminated by retrenchment. The Court, without discussing the question of whether the collective bargaining agreement between plaintiffs and defendant may have constituted a waiver of due process, held that the layoffs due to financial exigencies were clearly within the discretionary area reserved to the defendants (citing *Bignall* v *North Idaho College*, 538 F2d 243 [9th Cir., 1976] and *Johnson* v *Board of Regents of University of Wisconsin*, 377 F Supp 227 [WD Wis., 1974], affd 510 F2d 975 [7th Cir., 1975]), that plaintiffs were not entitled to hearings prior to the termination decisions, and that the post termination hearings which did not give them an opportunity to challenge the existence of financial exigency were nevertheless constitutionally adequate.

Insofar as petitioners complain of the denial of the full panoply of due process available through judicial resolution of their claim, respondents submit that they were properly found to have waived their right thereto.

In *Arnett* v *Kennedy*, 416 US 134, 40 L ed 2d 15 (1974) Mr. Justice RHINQUIST stated:

> "that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant * * * must take the bitter with the sweet." (416 US at 153-154)

The Constitution, this Court has held, does not forbid requiring a person to make a choice even where it may be of constitutional dimension (*Middendorf* v *Henry*, 425 US 25, 47 L ed 2d 556; *McGautha* v *California*, 402 US 183, 28 L ed 2d 711 [1971]). Surely then the petitioners were properly held to the choice which was made for them by their representative in the collective bargaining agreement.

CONCLUSION

PETITIONERS' APPLICATION FOR CERTIORARI SHOULD BE DENIED.

Dated: January 16, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Respondents

JEREMIAH JOCHNOWITZ
WILLIAM J. KOGAN
Assistant Solicitors General
of Counsel